**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 605 OF 1989**

1. Mohamed Kasam Shamshuddin Shaikh
2. Jagdish @ Jagya Bhaskar Jadhav
both Indian adults, presently lodged at Nasik Prison and residents of Goregaon, Bombay ..Appellants (Accused)

versus

State of Maharashtra in Bombay Sessions Case No.554 of 1988 in Goregaon Police Station C.R. No. 101/88 ..Respondents

Mr. Majeed Memon, Sr. Advocate with Mr. Subhash Kanse for the Appellants.

Dr. F. R. Shaikh, APP for the Respondents - State.

**CORAM : D. G. DESHPANDE, &**
**S. R. SATHE, JJ.**

**DATE : 10TH JANUARY, 2007.**

**ORAL JUDGMENT : ( Per : D. G. Deshpande, J.) :**

1. Heard Counsel for the Appellants - accused and learned APP for the State.

2. The original two accused have filed this Appeal challenging their conviction under Section

393 r/w. 34 of I.P.C. and under Section 302 r/w. 34 of I.P.C. They have been sentenced to life imprisonment under Section 302 r/w. 34 and for five years under Section 393 r/w. 34 of I.P.C. by the Additional Sessions judge, Greater Bombay, by Judgment dated 26.7.1989.

3. The case of the prosecution is that deceased Venugopal, a person from Kerala was working as a Publicity Officer with Life Insurance Corporation of India at Bombay. He was residing with his wife Indira who was serving as an Executive in Otis Elevators India Limited. They had a daughter by name Sangita aged 17 years and son by name Harjit aged 13/14 years. They were staying at Goregaon. This family was in the habit of going to Ayyappa Temple. On 13.2.1988, as usual, they left their house for going to the temple by tar road. They were at the temple for some time and then they started returning back. While they were proceeding towards Sargam Building, on way to their house they came near the structure of tin known as Bengali Kallon. At that time, Indira saw two persons standing by that structure. Accused No.1 came ahead and stopped in front of Indira. She was shocked and

became alert. Then accused No.1 put his hand near the neck of Indira to snatch the golden chain. Anticipating this move of Accused No.1, Indira tried to resist by one hand and tried to cover the chain by hand. She uttered some words which were heard by her husband Venugopal who was just behind her. He came ahead and tried to push accused No.1. There was a scuffle. Accused No.2 is alleged to have assisted accused No.1 and then Venugopal was pushed towards marshy land and the accused No.1 took out a knife and gave blow on the right side neck of Venugopal. The three witnesses i.e. Indira, Sangita and Harjit were stunt and then the accused ran away.

4. Venugopal fell down with a blood injury and Indira ran towards the temple for assistance, she came back with some persons. Then local doctor Desai was called but he found that the condition of Venugopal was serious. He advised that Venugopal be taken to the hospital. Accordingly a car was called and Venugopal was removed in that car to the hospital of Dr. Panvalkar. But, unfortunately, doctor declared him to be dead before any treatment could be given. It appears that because it was a

medico-legal case, doctor did not do anything nor tried to ascertain the cause of death and he advised that body of Venugopal be taken to the spot from where he was brought and police be called. In the meantime, a Head Constable Pande on patrolling duty happen to come there and Venugopal was taken to Cooper hospital where he was declared dead. One person Thambi was present. He reported the matter to Goregaon Police Station at 10.45 p.m. His report was taken as FIR and offence under Section 307 and 393 of IPC was registered. On the next day panchnama of the scene of offence was drawn. Statement of the son of the deceased was recorded so also the statement of Indira. The names of the accused were there in the police station as persons committing similar type of offences. Therefore, police went in search of them. They were found at Kurla on the night of 15th and 16th February, 1988. They were arrested and sent to Metropolitan Magistrate. Test Identification Parade was held. Three witnesses identified accused No.1 as culprit trying to snatch the chain and giving stab blow to Venugopal and accused No.2 coming to the help of accused No.1 and giving kicks and fists blows.

5. Then on the evening of 16.2.1988 at 5.30 p.m. at the instance of accused No.1 his clothes and knife were recovered and on the same day at 7 p.m. blood stain clothes were recovered at the instance of the accused No.2. After completing investigation, charge sheet was filed. The defence of the accused was of total denial. Evidence adduced by the prosecution in the form of three eye witnesses, the medical evidence, recovery evidence and the evidence of identification was accepted by the trial court, and, appellants - accused came to be convicted as stated above, and, hence, this appeal.

6. Mr. Memon tried to contend that admittedly the accused were unknown but police arrested them only because of their previous history and implicated them in this false case. He also contended that the identification parade was faulty and it could not be relied upon, and, if the identification parade is disregarded, then nothing remains there to connect the accused with the crime. Offence of discovery of weapon and clothes at the instance of both the accused was also simultaneously attacked by Mr. Memon.

7. On the other hand, the learned APP contended that this was a full proof case with no doubt about the involvement of both the accused. According to him, Indira had ample opportunity to see accused No.1 because he obstructed her, tried to snatch the chain and when she opposed, he assaulted her husband and then inflicted blow on the neck with a knife. This much time was more than sufficient for Indira to completely and fully identify the accused No.1. So far as accused No.2 is concerned, learned APP tried to contend that he was rightly convicted under Section 34 because he had shared a common intention. He also stated that she identified both the accused and nothing is brought out in the cross-examination to discredit her testimony. Apart from the fact that she has absolutely no reason to falsely implicate both these accused.

8. We were taken through the entire evidence adduced by the prosecution and the judgment of the trial court. The evidence of Indira P. W. 1 is fully corroborated by Sangita P.W. 3 - the daughter of deceased Venugopal and Indira. She has given the same version. She had identified both the accused

in court as the persons present there and accused No.1 tried to snatch the chain and inflicted blow on Venugopal. She also admitted that she had identified both the accused by attributing specific role as per the case of the prosecution. Her cross-examination also has not resulted in discrediting or creating doubt about her testimony.

9. Evidence of Indira and Sangita is further corroborated by P.W. 4 Harjeet - son of deceased Venugopal and Indira. He is a boy of 11 years when his evidence was recorded and he has not only corroborated the testimony of mother Indira but also identified both the accused.

10. Regarding this evidence, Mr. Memon tried to contend that there was darkness on the road as there were no street lights and therefore it was impossible for Indira to identify the accusd. We do not find any force in the submission. From the version given by Indira, it is clear that she had ample opportunity to see both the accused, particularly, accused No.1. Similarly, her daughter and son both were just by her side at that time and therefore they had also sufficient opportunity.

Nothing is brought out in the cross-examination to show that these three witnsesses were shown the accused before the parade.

11. Then, there is evidence of P.W. 9 Manubhai Patel - panch on the discovery memo. He has stated that on 16.2.1988 he was called in the police station. Accused No. 1 was there, he was saying that he had kept clothes and knife at his house and he will point out. Then memorandum was prepared at Exhibit '2'. Thereafter the accused led police party to his house, accused No.1 told that it was his house. There was a cupboard in the room and from underneath the cupboard he took out a knife, clothes i.e. a jercy and jean pant. There were blood stains on the jercy. The knife was a folding knife with a wooden handle and the blade had blood stains. The clothes and the knife were wrapped in brown paper, labelled and sealed. There is no effective cross-examination about this discovery at all. Then panchnama of the seizure was prepared and signed by panchas and police officers. It is Exhibit 21. Witness also identified the clothes as articles before the court.

12. There is also discovery of clothes at the instance of accused No.2, proved by P.W. 10 Raja Gatti - a panch witness. It was a shirt and pant with dark stains on the shirt.

13. Then, there is evidence of identification parade by P. W. 13 SEM Kesarinath Chitnis. He stated about holding the parade on 16.2.1988 and has stated that three witnesses identified both the accused separately. No submissions were made regarding this parade and therefore that evidence has to be accepted as it is.

14. Muddemal article including the clothes of the deceased, the things recovered from the spot, clothes of the accused and the weapon were sent to the C.A. Reports of the C.A. are on record. As per Exhibit 38 knife item No.10 is stained with blood. It is a human blood. Though grouping could not be done. As per Exhibit 39 blood group of accused Mohamad Kasam Samsudhin Shiakh is 'O' and articles 4 and 5 - the clothes of the accused.

15. Considering therefore all this evidence, it is clear that prosecution has succeeded in proving

that accused No.1 at least is guilty of the offence charged.

16. Neither there is any defect in the identification parade nor any lacunas in the evidence of three witnesses Indira, Sangita and Harjeet. They have given evidence in proper sequence and manner. Three witnesses have corroborated each other. They identified the accused in the parade as well as in the court. Knife was recovered at the instance of the accuseed. Human blood was found on it. So far as accused No.2 is concerned, we do not find that he can be convicted under Section 34. No doubt he was there and he might have assaulted deceased, but it cannot be said that in the act of snatching by accused No.1 or attempt to snatch gold chain of Indira by accused No.1 or in the act of causing injury by accused No.1 to Venugopal, this accused shared a common intention. It may be that he was knowing about the activities of accused No.1 but there is difference between ’may be’ and ’must be’. There is no conclusive evidence to connect the accused No.2 with the offence of robbery or murder of Venugopal, and, therefore, he is entitled for the benefit of doubt.

As a result, we pass the following order:

**ORDER**

Appeal is partly allowed.

Conviction of the Appellant - accused No.1 is maintained. Appellant - accused No.1 to surrender before the trial court within four weeks from today. If he fails to surrender, the trial court to take appropriate action against him under Criminal Procedure Code and sent him to jail for undergoing sentence imposed by the trial court.

Appellant - accused No.2 is acquitted of the offences. His conviction is set aside. He is on bail, his bail bond stands cancelled.

**(D.G. DESHPANDE, J.)**

**(S. R. SATHE, J.)**